



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
FREEDOM OF INFORMATION ACT BRANCH
Washington, D.C. 20570

Via email

September 27, 2023

Re: FOIA Request NLRB-2023-001451

Dear Jacob Sagert (America First Policy Institute):

This is in response to your request, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, received in on May 19, 2023, in which you sought:

All e-mails sent to or from agency political appointees pertaining to diversity trainings that such appointee participated in;

All materials or handouts provided to agency political appointees at any diversity training they participated in pursuant to their position as an agency employee;

All "management action plans" or similar records describing plans to incorporate DEI principles into agency operations created by agency political appointees attendant to such diversity trainings; and

To the extent that such diversity trainings were held via videoconference, any

- recordings and/or transcripts made of any of any such trainings;
- chat messages exchanged between any participants in any of these diversity trainings;
- files shared between any participants in any of these diversity trainings;
- "meeting notes" made or exchanged as part of any of these diversity trainings; and/or
- "Q&A" or "Meeting Whiteboards" or similar records created as part of any of such diversity training sessions.

You did not agree to pay any fees for the processing of this request, and you also requested a fee waiver.

We acknowledged your request on May 19, 2023. In an exchange of emails with a member of the FOIA staff on June 29, 2023, you amended the scope of your request and agreed to receive records recently released in a similar media

request (NLRB-2023-000609), that is, “Agency DEIA training materials, vendor contract(s), and also data reflecting employee, managers and leadership participation on the topic of diversity, equity, inclusion and accessibility (DEIA) in response to Executive Order 14035 – Diversity, Equity, Inclusion and accessibility.” Additionally, as to the portion of your request seeking emails, you agreed to receive “emails sent from NLRB political appointees to NLRB employees about DEIA trainings[.]”

Your request is granted in part and denied in part, as explained below.

Records released in NLRB-2023-000609

As to the portion of your amended request seeking DEIA trainings/materials and your acceptance of records released in NLRB-2023-000609 (also accessible in FOIAonline), please see the information below for a complete discussion of the records provided in response to that request.

As part of our processing and search for that request, we directed search inquiries to the Agency’s Division of Administration, which includes the Diversity, Equity, Inclusion, and Accessibility (DEIA) Program. We also directed search inquiries to the Agency’s Office of Equal Employment Opportunity (OEEEO), Office of Employee Development (OED), and the Office of the Chief Financial Officer/Director of Acquisitions, with the following results:

1. The Division of Administration through the Chief Diversity Officer and staff in the OEEEO reported that, beginning about January 2022, the Agency began developing its “Diversity, Equity, Inclusion and Accessibility Strategic Plan (Fiscal Years 2022-2026)”. This record was publicly posted on the Agency’s website in March 2023 and is available through this link:
<https://www.nlr.gov/sites/default/files/attachments/pages/node-1132/nlr-deia-strategic-plan-2022-2026.pdf>
2. The OED, in coordination with the OEO, provided a transcript from the PowerPoint training entitled, “Unconscious Bias & Cultural Inclusivity.” The transcript of this training, which is 348 pages, was deemed responsive to your FOIA request. Upon our review, it became apparent that the record originated from the U.S. Census Bureau’s Diversity and Inclusion Office and was later adapted for NLRB usage by the NLRB’s OEEEO. We consequently directed a consultation to the Census Bureau for that office to review the record, given their shared equity. Upon the Census Bureau’s additional review, the transcript of that program is being released in full.
3. The OED also reported to the FOIA Branch that, in September 2022, DEIA trainings and materials were made available to Agency employees. The Agency contracted with Skillsoft, a commercial provider, for a commercial-off-the-shelf (COTS) online learning products that Agency employees could

access through the vendor's external website; as such, these products were not tailored for NLRB use. All employee trainings related to off-the-shelf DEIA topics that existed as of March 2023—the date upon which this search was completed—are from the licensed vendor. To the extent that you seek actual trainings from outside vendors, the OED staff confirmed that the vendor software is not in the Agency's possession. Consequently, these are not Agency records but rather are the property of the vendor. As a courtesy, we provided a hyperlink to the vendor's website. [Employee Development: Online Training Solutions | Skillsoft](#). I have provided the names of the course/trainings in the participation/completion chart under item #4, below.

4. The OED provided the following data regarding the number of course completions between January 1, 2022 through the date the search was conducted on January 19, 2023 in response to the portion of your request seeking employee participation in COTS trainings on DEIA topics "[t]o the extent that participation in such trainings is statistically tracked":

Course	# of completions
Understanding Unconscious Bias	10
Overcoming Your Own Unconscious Biases	8
Overcoming Unconscious Bias in the Workplace	5
Becoming a DEI Ally and Agent for Change	1
Embedding Inclusion into Everyday Experiences	1
Embracing the Power of Diversity and Inclusion Featuring Special Olympics	2
Expert Insights on Unconscious Bias	1
Great Leaders Must Be Inclusive Featuring Special Olympics	2
Leadership Insights on Leading Diversity	1

5. The Office of the Chief Financial Officer/Director of Acquisitions provided a copy of the Agency's contract with Skillsoft in response to the portion of your request seeking vendor contracts. That 14-page contract is attached. After a review, I have determined that certain portions of the Skillsoft contract are exempt from disclosure under FOIA Exemption 4, 5 U.S.C. § 552(b)(4), as it contains commercial or financial information of the vendor such as itemized quotes or prices per license. This information, submitted as part of a competitive bidding process to provide services to the Agency, has been designated and treated as confidential by the vendor. Because the vendor customarily keeps this information private and does not make it publicly available, and there was no indication at the time the information was submitted that the Agency would publicly disclose it, the information is

confidential for purposes of Exemption 4. *See, Food Mktg. Inst. v. Argus Leader Media*, 139 S.Ct. 2356, 2366 (2019) (data from individual grocery retailers found to be “confidential” within meaning of Exemption 4 as requested information was treated as private by its owners and provided to the government under an assurance of privacy).

Additionally, a search of the Agency’s internal SharePoint site was conducted by a member of the FOIA Branch, and a recording of the “2022 LGBTQ Pride Month Event” was located. The content includes historical information surrounding and challenges facing the Lesbian, Gay, Bisexual, Transgender, and Queer (LGBTQ) Community, as well as discussions of personal and family experiences by the participants and resources for further information. The event was educational in nature, intended for, and attended by only Agency employees, and contains the images and voices of the individuals sharing their sensitive, personal information with and among colleagues. The video was not intended for public distribution, nor is the recording available outside of the Agency. Participation in the program was voluntary, subject to employees’ availability and consistent with operational requirements.

Upon review, I determined that the video recording was exempt under Exemption 6 of the FOIA (5 U.S.C. § 552(b)(6)). However, due to technological limitations, the exempt portions of the record are not segregable from the non-exempt portion, and for this reason, the video was withheld in its entirety. *See Milton v. Dep’t of Justice*, 842 F. Supp. 2d 257, 259-61 (D.D.C. 2012) (explaining that segregability analysis focuses on “the agency’s current technological capacity” and holding that responsive telephone conversations were not reasonably segregable because agency did not possess technological capacity to segregate non-exempt portions of requested records); *see also Mingo v. Dep’t of Justice*, 793 F. Supp. 2d 447, 454-55 (D.D.C. 2011) (concluding that nonexempt portions of recorded telephone calls are inextricably intertwined with exempt portions because agency “lacks the technical capability” to segregate information that is digitally recorded); *Burns v. U.S. Dep’t of Justice*, No. 99-3173, slip op. at 2 (D.D.C. Feb. 5, 2001) (concluding that agency is “not required to obtain new equipment to process [p]laintiff’s FOIA request”).

However, the Agency’s OEO was able to locate and provide a transcript of the program, which was released in lieu of the exempt recording, as it allows for the withholding of exempt information. As discussed above and elaborated below, the recording is being withheld in full, but the transcript is being released in part, with personally identifiable information withheld under Exemption 6.

Exemption 6 permits agencies to withhold information about individuals in “personnel and medical and similar files” where the disclosure of the information “would constitute a clearly unwarranted invasion of personal privacy.”

5 U.S.C. § 552(b)(6). The terms “personnel and medical and similar files” are meant to be interpreted broadly such that information about an individual should not lose the protection of Exemption 6 merely because it is stored by an agency in records other than “personnel” or “medical” files. *U.S. Dep’t of State v. Washington Post Co.*, 456 U.S. 595, 601, 102 S. Ct. 1957, 1961, 72 L. Ed. 2d 358 (1982).

The application of Exemptions 6 requires a two-part balancing test that considers: (1) whether there is a legitimate personal privacy interest in the requested information, and, if so, (2) whether there is a countervailing public interest in disclosure that outweighs the privacy interest. *Judicial Watch, Inc. v. Nat’l Archives & Records Admin.*, 214 F. Supp. 3d 43, 58 (D.D.C. 2016), *aff’d*, 876 F.3d 346 (D.C. Cir. 2017), citing *Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 171 (2004).

With respect to the first factor, I note that the recording is replete with the personally identifiable information of the participants, most of whom are federal employees. These participants all have a privacy interest in their images, voices, and information they convey. Although federal employees have a diminished privacy interest in information related to their jobs (see OPM Regulation, 5 C.F.R. § 293.311 (2018) (specifying that certain information contained in federal employee personnel files is generally available to public)), here, the information conveyed is not related to the employees’ job functions. Nevertheless, a diminished interest is still an interest that is protectible. Courts have found that federal employees have a protectible privacy interest in purely personal details that do not shed light on agency functions. See *Smith v. Dep’t of Labor*, 798 F. Supp. 2d 274, 284 (D.D.C. 2011); see also *Cowdery, Ecker & Murphy, LLC v. Dep’t of Interior*, 511 F. Supp. 2d 215, 219 (D. Conn. 2007) (“Because exemption 6 seeks to protect government employees from unwarranted invasions of privacy, it makes sense that FOIA should protect an employee’s personal information, but not information related to job function.”); *Sai v. TSA*, 315 F. Supp. 3d 218, 262 (D.D.C. 2018) (protecting “personal information” regarding two TSA employees for which there was no public interest in disclosure). Moreover, federal employees maintain a privacy interest in the right to control information related to themselves and to avoid disclosures that “could conceivably subject them to annoyance or harassment in either their official or private lives.” *Lesar v. U.S. Dep’t of Justice*, 636 F.2d 472, 487 (D.C. Cir. 1980). Thus, information that pertains to an employee’s personal life and family status should be withheld from third parties pursuant to Exemption 6; the public is entitled to information that generally pertains to the qualifications for and the performance of federal employment, but federal employees are as fundamentally entitled to privacy protection as are members of the public. Office of Information Policy, Dep’t of Justice, *FOIA Update, Vol. III, No. 4* (1982) (“Privacy Protection Considerations”) (discussing extent to which privacy of federal employees can be protected). See also *Info. Acquisition Corp. v. Dep’t of Justice*, 444 F. Supp. 458, 463-64 (D.D.C.

1978) (protecting “core” personal information such as marital status and college grades). Accordingly, the Agency employees who appear in this recording retain a privacy interest in their images, voices, and personal details of their lives.

With respect to the second factor, the public’s interest in disclosure depends on “the extent to which disclosure would serve the ‘core purpose of the FOIA,’ which is ‘contribut[ing] significantly to public understanding of the operations or activities of the government.’” *U.S. Dep’t of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 495 (1994) (emphasis in original), *quoting Reporters Comm.*, 489 U.S. at 775. As the Supreme Court further explained in *Nat’l Archives & Records Admin.*, 541 U.S. at 172, to defeat a privacy interest there must be some indication that the “public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake . . . [and that] the information is likely to advance that interest.” I do not find that the contents of the recording will assist in advancing the public interest related to Agency’s performance of its duties.

Applying the above balancing test, I have determined that the personal privacy interests at stake outweigh any public interest, and for this reason, the portion of the recording showing Agency staff is exempt from disclosure. The withheld recording contains individuals’ names, faces, voices, recollections of personal experiences, and other identifying information that fit squarely within the types of privacy interests that Exemption 6 was intended to protect from disclosure. As noted above, federal employees retain a privacy interest in the protection of their personal information. By contrast, I perceive no countervailing public interest in disclosure. Without any such interest, there is no need to “linger over the balance; something, even a modest privacy interest, outweighs nothing every time.” *Nat’l Ass’n of Ret. Fed. Emps. v. Horner*, 879 F.2d 873, 879 (D.C. Cir. 1989). Accordingly, absent a public interest that outweighs the private interests identified and because the non-exempt cannot be segregated from the exempt, the recording is withheld, as protected from disclosure under Exemption 6.

However, the transcript is releasable as it does not contain the same personally identifiable information as the recording. There are no images, nor voices in the transcript, and the other identifying information, such as names and personal information unrelated to job functions, can be and is being withheld under Exemption 6 for the reasons discussed above. Accordingly, 204 pages of this transcript record are attached with redactions for privacy under Exemption 6.

Emails sent from NLRB political appointees

As to the second part of your amended request for “emails sent from NLRB political appointees to NLRB employees about DEIA trainings,” an email search was conducted on July 26, 2023, using the Agency’s email search tool. This search was supplemented by same-day search inquiry directed to the Office of General Counsel. The searches resulted in ninety-four (94) pages of responsive

records, including emails, email attachments, and records hyperlinked and referenced in the emails, which are attached. No information is being withheld from these records. Accordingly, they are being released in full.

However, please note that this release includes an email dated March 16, 2023 with a hyperlink to the video, slides, and supporting documents from a program entitled "Creating a Culture of Inclusion for LGBTQIA+ Colleagues and Constituents." The referenced records, while not included in the email itself, were determined to be responsive to your request. The slides and supporting documents from that program are included and being released without redaction. However, the video portion of the program is being withheld in full under FOIA Exemption 6 as its disclosure could constitute an unwarranted invasion of privacy for third party individuals whose images and voices are contained within the video. As explained above, the withheld record contains identifying information, individuals' images and voices, which fit squarely within the types of privacy interests that Exemption 6 was intended to protect from disclosure. Exemption 6 protection has been extended to recordings since voice sounds can apply to a "particular individual" and thus requires protection from disclosure. *New York Times Co. v. NASA*, 920 F.2d 1002, Notes see 1009-1010 (D.C. Cir. 1990).

For the purpose of assessing fees, we have placed you in Category C, as a representative of the news media, in that you qualify as a person "actively gathering news for an entity that is organized and operated to publish or broadcast news to the public." NLRB Rules and Regulations, 29 C.F.R. § 102.117(d)(1)(vii). Accordingly, there is no charge assessed for this request. Given your fee category placement as a media requester, your request for a fee waiver is moot.

You may contact Patrick Plummer, the Attorney-Advisor who processed your request, at 202-273-2999 or by email at patrick.plummer@nrlb.gov, as well as the Agency's FOIA Public Liaison, for any further assistance and/or to discuss any aspect of your request. The FOIA Public Liaison, in addition to the Attorney-Advisor, can further explain responsive and releasable agency records, suggest agency offices that may have responsive records, and/or discuss how to narrow the scope of a request in order to minimize fees and processing times. The contact information for the Agency's FOIA Public Liaison is:

Kristine M. Minami, FOIA Public Liaison
National Labor Relations Board
1015 Half Street, S.E., 4th Floor
Washington, D.C. 20570
Email: FOIAPublicLiaison@nrlb.gov
Telephone: (202) 273-0902
Fax: (202) 273-FOIA (3642)

After first contacting the Agency, you may additionally contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA dispute resolution services it offers. The contact information for OGIS is:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road-OGIS
College Park, Maryland 20740-6001
Email: ogis@nara.gov
Telephone: (202) 741-5770
Toll free: (877) 684-6448
Fax: (202) 741-5769

You may obtain a review of this determination under the NLRB Rules and Regulations, 29 C.F.R. § 102.117(c)(2)(v), by filing an administrative appeal with the Division of Legal Counsel (DLC) through FOIAonline at: <https://foiaonline.gov/foiaonline/action/public/home> or by mail or email at:

Nancy E. Kessler Platt, Chief FOIA Officer
National Labor Relations Board
1015 Half Street, S.E., 4th Floor
Washington, D.C. 20570
Email: DLCFOIAAppeal@nlrb.gov

Any appeal must be postmarked or electronically submitted within 90 calendar days of the date of this letter. Any appeal should contain a complete statement of the reasons upon which it is based.

Please be advised that contacting any Agency official (including the Attorney-Advisor, FOIA Officer, or the FOIA Public Liaison) and/or OGIS does not stop the 90-day appeal clock and is not an alternative or substitute for filing an administrative appeal.

Sincerely,

/s/ Kristine M. Minami

Kristine M. Minami
Acting FOIA Officer

Attachment: (566 pages from NLRB-2023-000609, plus 94 additional pages)